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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NO. [redacted]35

J. RAY McDERMOTT & CO., INC.,
Petitioner,

versus

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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FEDERAL POWER COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, J. Ray McDermott & Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 14, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. (2d) 1004, and is printed as Appendix B to the petition of The United Gas Improvement Company, et al., No. 671, October Term, 1964, (herein referred to as "UGI petition") for a writ of cer-

tiorari to review the same judgment.[1] The opinions of the Federal Power Commission are reported at 30 F.P.C. 283 and 30 F.P.C. 682, and are printed in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General (R. 550-93, 607-17).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. On September 3, 1964, petitioner applied for rehearing. On September 21, 1964, rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED[2]

Whether the Federal Power Commission may, under Section 7(e) of the Natural Gas Act, retrospectively review rates and impose retroactive refunds because an unconditional permanent certificate issued to a producer is thereafter set aside by the Courts.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, as amended (15 U.S.C. Sections 717-717w), are set forth in Appendix A, *infra*, pp. 1a, et seq.

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[1] The opinion is also copied as an appendix to the respective petitions in Nos. 678 and 714.

[2] In its specification of errors in its brief to the Court of Appeals, petitioner had complained of the Commission's failure to allow petitioner reimbursement of amounts paid the United States in lieu of severance taxes. Petitioner believes that it was the intention of the Court of Appeals to cover this point in its order of remand (see 335 F. (2d) at pp. 1020-1, n. 59; Petition of The United Gas Improvement Company, et al., No. 671, p. 36a). If Petitioner is wrong in its interpretation of the decision below, then the additional question is presented: Whether reimbursement should be allowed for amounts paid to the United States in lieu of state severance taxes, at least to the extent reimbursement of state severance tax is allowed?

STATEMENT

On August 10, 1959, the Federal Power Commission (Commission) issued Opinion No. 327[3] granting to petitioner an unconditional permanent certificate of public convenience and necessity authorizing sales of gas to Hope Natural Gas Company (Hope) at a price of 23.55¢ per Mcf, including tax reimbursement of 2.05¢ per Mcf.[4] The Public Service Commission of New York (New York) sought judicial review of Opinion No. 327 but did not seek to stay its effectiveness.[5] Therefore, petitioner filed its contract with the Commission and commenced deliveries of gas. With CATCO[6] as a guide the Court of Appeals for the District of Columbia[7] reversed the Commission and remanded the proceedings to the Commission to give the producers the opportunity to augment the record to support their contract prices.

After the mandate returned from the Court of Appeals the Commission took no immediate action.[8] On May 10, 1961, the Commission consolidated the remanded pro-

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[3] 22 FPC 378; R. 116-141.

[4] This price prevails only for that part of the gas produced from State of Louisiana water bottoms. The bulk of the gas is produced from Federal water bottoms, or disputed water bottoms and the initial contract price for such gas is 21.7625¢ per Mcf.

[5] New York did not seek a stay from the Commission or the reviewing court. In this regard Section 19(c) of the Natural Gas Act, 15 U.S.C. 717r(c), provides:

> "(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

[6] *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378.

[7] *Public Serv. Comm'n v. FPC*, 287 F. 2d 146 (C.A. D.C.), cert. denied, 365 U.S. 880.

[8] After the CATCO decision Long Island Lighting Company filed a motion requesting the Supreme Court to amend its judgment to require the Court of Appeals for the Third Circuit to retain jurisdiction "to enable it to direct the payment of any refunds which may become payable." In reliance on *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, Long Island noted that the Commission lacked power to order refunds "except pursuant to further order of the Court of Appeals". The Supreme Court denied this motion.

ceedings with the Southern Louisiana Area Rate Proceeding in Docket No. AR61-2.

On January 10, 1962, the Commission issued an order warning petitioner that it intended to grant refunds to the extent it was empowered to do so at the conclusion of the proceeding (R. 395). On March 7, 1962, the Commission issued an order denying certain Applications for Rehearing of the January 10, 1962, order, severing its certificate proceedings from the Southern Louisiana Area Rate Proceeding; and consolidating them for hearing with other producer certificates (R. 410).

A hearing was conducted before a Presiding Examiner who issued his decision on December 7, 1962 (R. 491). Appeals to the Commission were filed by various parties. On July 17, 1963, the Commission issued Opinion No. 398[9] in which it reduced petitioner's price to 20.0¢ per Mcf, including tax reimbursement,[10] and adopted the Presiding Examiner's decision that refunds were required with seven per cent interest on all amounts collected in excess of the conditioned price from the date of initial delivery.

Petitioner filed a timely Petition for Review in the Court of Appeals for the Fifth Circuit, alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion[11] in which it found that the Commission erred in excluding cost and economic evidence; that the Commission erred in imposing a price moratorium on petitioner's permanent certificates; that the Commission could condition the "take or pay" clauses in petitioner's contract

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[9] 30 FPC 283; R. 549.

[10] 18.5¢ per Mcf. for the Federal and Federal-State conflict areas.

[11] Seven other producers filed petitions for review in the Fifth Circuit. Pursuant to procedures agreed upon by the Commission, producer counsel and the Court, the various petitions were consolidated for oral argument, briefing schedules and preparation of the record.

upon a future decision in a rulemaking docket; and that the Commission had authority to require retroactive refunds, but that the Commission must first make a just and reasonable rate determination in appropriate proceedings in order to determine the amount of the refund. In view of its other holdings the Court did not discuss the questions raised by petitioner as to the validity of the Commission's "in-line" price determination or the failure to allow reimbursement for amounts paid the United States in lieu of severance taxes.

REASONS FOR GRANTING THE WRIT

As to the issue of retroactive refunds, the Court of Appeals held[12] (first) that refunds could be required, but (second) only on the basis of the difference between the price collected and the rate found in a proper proceeding to be the just and reasonable rate. It is the first holding which petitioner here attacks. The second, under the circumstances of this case, would obviously be correct [13] were refunds to be ordered.

The Court of Appeals first found:[14]

> " * * * Under the structure of the Act, it has long been recognized, and never questioned, that ' * * * * under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed and in force." ' *FPC v. Hope*

[12] 335 F. (2d) at p. 1020; UGI petition, p. 35a.

[13] The Commission may not constitutionally fix a rate which results in confiscation. *Cf. Missouri, ex rel Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276; *Bluefield Water Works & Imp. Co. v. Public Service Commission*, 262 U.S. 679; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287. Petitioner had raised the issue of confiscation as to both the prospective and the retrospective (refund) rate levels established by Opinion No. 398, and had offered evidence (which had been excluded) to support its contention. In order to avoid a confiscatory refund order, where the issue is raised, it is necessary to determine a just and reasonable rate.

[14] 335 F. (2d) at pp. 1018-19; UGI petition, p. 32a.

Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S. Ct. 281, 295, 88 L. Ed. 333."[15]

The Court then concluded that the Commission, though lacking the power "to retrospectively review rates and impose retroactive refund orders" nevertheless had "inherent power to recapture the fruits obtained under an invalid, that is illegal, order."[16] Because of the "unique circumstances of this case," the Court found refunds to be proper.

The effect of this holding is to vest in the Commission an undefined "equitable power", not granted it by the statute, to order reparations in any case in which an initial Commission order, though not stayed, is later reversed. It also gives to the Commission the power, denied to it by the statute, effectively to fix initial rates.

The Commission is a creature of statute, not a court of chancery. In theory, it possesses no powers not granted it by the statute. If it is, in fact, to possess such powers, the grant should come from the legislature, not the courts. A decision recognizing the existence of such powers is necessarily of grave import to the administration of the Act. In upholding the existence of a power to order reparations, the decision of the Court of Appeals is in conflict with prior decisions of this Court,[17] and of the Fourth Circuit.[18]

Further, the "filed rate" doctrine is the backbone

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[15] The Court also cited: *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246; *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F. (2d) 289, 292 (C.A. 3rd); *T.I.M.E. v. United States*, 359 U.S. 464, 469-70.

[16] 335 F. (2d) at p. 1019; UGI petition, p. 33a.

[17] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254.

[18] *Hope Natural Gas Co. v. FPC*, 134 F. (2d) 287, 310-11 (C.A. 4th), rev'd on other grounds 320 U.S. 591.

of the rate-making theory of the Act. The Commission may not fix initial rates.[19] Rates lawfully on file may lawfully be collected unless lawfully changed in a proper proceeding under Section 4 or 5 of the Act,[20] which Sections operate **prospectively.** If the rates are lawfully on file under Section 4 of the Act, they can hardly be "unlawful" under Section 7. And a decision which **creates** a conflict between two sections of the same statute, which undermines the basic statutory "filed rate" theory, and which is in conflict with the decisions of this Court in the *Mobile* and *Memphis* cases,[21] is bound to be of the most serious consequence.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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[19] *United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332, 340-346; *United Gas Pipe Line Company v. Memphis Light, Gas & Water Div.*, 358 U.S. 103.

[20] See pp. 1a-4a, *infra.*

[21] *Supra*, n. 19.

APPENDIX A

Being excerpts from the Natural Gas Act, as amended (15 U.S.C. § 717a, *et seq.*):

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by the natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the

proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c]

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall

fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d(a)]

* * * * *

Sec. 7: * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * * [15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified appli-

cant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

* * * * *

Sec. 19: * * *

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [15 U.S.C. § 717r(c)]